(1) Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

AIRMAN FIRST CLASS SHAWN T. BRIDGES,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

TIMOTHY W. MURPHY
Lieutenant Colonel, U. S. Air Force
Air Force Legal Services Agency
Counsel of Record

BEVERLY B. KNOTT
Lieutenant Colonel, U.S. Air Force
Air Force Legal Services Agency
Counsel for Petitioner

Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB D.C. 20332-8000
(202) 767-1563

August 2001

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QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment of the United States Constitution is violated when a prosecution witness refuses to answer questions, there is no opportunity for unrestricted cross-examination in an interlocutory hearing, and the defense has not procured the witness' unavailability?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2
- Proceedings Below 2
- Facts 4

REASON FOR GRANTING THE WRIT 6

CONCLUSION 10

APPENDIX A
- (Opinion of the United States Court of Appeals for the Armed Forces) 1a

APPENDIX B
- (Opinion of the United States Air Force Court of Criminal Appeals) 19a

APPENDIX C
- Relevant Constitutional and Statutory Provisions 35a

TABLE OF AUTHORITIES

Page

United States Constitution
U.S. CONST. AMEND. VI ..... *passim*

Federal Statutes
10 U.S.C. § 839(a) [Article 39(a), U.C.M.J.] 5, 6, 8, 9
10 U.S.C. § 858(b) [Article 58b, U.C.M.J.] 2
10 U.S.C. § 928 [Article 128, U.C.M.J.] 2

Supreme Court Cases:
Barber v. Page, 390 U.S. 719 (1968) 7, 8
Berger v. California, 393 U.S. 314 (1969) 7
Brookhart v. Janis, 384 U.S. 1 (1966) 7, 9
Chambers v. Mississippi, 410 U.S. 284 (1973) 7
Douglas v. Alabama, 380 U.S. 415 (1965) 7
Glasser v. United States, 315 U.S. 60 (1942) 7
Idaho v. Wright, 497 U.S. 805 (1990) 6
Johnson v. Zerbst, 304 U.S. 458 (1938) 7, 9
Ohio v. Roberts, 448 U.S. 56 (1980) 6, 7
Reynolds v. United States, 98 U.S. 145 (1878) 7
Snyder v. Massachusetts, 291 U.S. 97 (1934) 6
United States v. Owens, 484 U.S. 554 (1988) 8

Federal Circuit Cases:
Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997) 7
Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982) 8
United States v. Balano, 618 F.2d 624 (10th Cir. 1979) .. 8
United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996) ..
..... 7, 9
United States v. White, 116 F.3d 903 (D.C. Cir. 1997) .. 8

Military Cases:
United States v. Hines, 23 M.J. 125 (CMA 1986) 8
United States v. Strombaugh, 40 M.J. 208 (CMA 1994) 6

Manual for Courts-Martial
Mil.R.Evid. 804(b)(5) 5

The petitioner, Airman First Class Shawn T. Bridges, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on May 29, 2001.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Bridges*, 55 M.J. 60 (2001), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, reported *at United States v. Bridges*, 52 M.J. 795 (A.F. Ct. Crim. App. 2000) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on May 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Constitution, the Uniform Code of Military Justice (U.C.M.J.), and the Manual for Courts-Martial (M.C.M.) are set forth in Appendix C.

STATEMENT OF THE CASE

Proceedings below:

On June 16 and 17, 1998, the Petitioner was tried by a general court-martial convened at Dyess Air Force Base, Texas. Contrary to his pleas, the Petitioner was found guilty of two specifications of assault in violation of Article 128, Uniform Code of Military Justice [hereinafter cited as U.C.M.J.] (10 U.S.C. § 928). He was sentenced to a dishonorable discharge, confinement for six months, and reduction in rank to Airman Basic.

On September 14, 1998, the Convening Authority[1] mitigated the sentence to a bad conduct discharge, confinement for six months, and reduction in rank to Airman Basic. Pursuant to Article 58b, U.C.M.J. (10 U.S.C. § 858b), the Convening Authority waived automatic forfeitures of Petitioner's military pay for six months to be paid for the benefit of his family.

On March 7, 2000, the Air Force Court of Criminal Appeals affirmed both the findings of guilty and the sentence in a published opinion. *United States v. Bridges*, 52 M.J. 795 (A.F. Ct. Crim. App. 2000). (Appendix B).

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[1] The Convening Authority is the commander who convenes a court-martial.

On September 20, 2000, the United States Court of Appeals for the Armed Forces granted review on the following issues:

I. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD THAT APPELLANT WAIVED HIS SIXTH AMENDMENT RIGHT TO CONFRONT JULIA BRIDGES, THE PROSECUTION'S KEY WITNESS.

II. WHETHER AIRMAN FIRST CLASS BRIDGES' RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS VIOLATED WHEN HIS WIFE'S STATEMENT TO LAW ENFORCEMENT INVESTIGATORS WAS ADMITTED UNDER MILITARY RULE OF EVIDENCE 804(b)(5).

On May 29, 2001, the United States Court of Appeals for the Armed Forces affirmed the decision below. *United States v Bridges*, 55 M.J. 60 (2001). (Appendix A). The question presented in this petition is based on the first issue granted by the Court of Appeals for the Armed Forces.

Facts:

Airman First Class Bridges was tried by general court-martial on charges of assaulting his two children, Allison and Thomas, and his wife, Julia. He was ultimately acquitted of assaulting Julia. At trial, the prosecution's evidence included incriminating oral and written statements by Airman First Class Bridges to military law enforcement investigators and a sworn written statement to law enforcement investigators by his wife, Julia.

To establish the foundation for admission of Airman First Class Bridges' statement, as well as oral comments, the prosecution first called Special Agent (SA) Richard Moreta of the Air Force Office of Special Investigations. (R. at 71) SA Moreta was one of the investigators in this case and interviewed Airman First Class Bridges on the night of December 8, 1997. (R. at 72; Pros. Ex. 1) He testified to the authenticity of Airman First Class Bridges' written statement and the circumstances surrounding it. (R. at 72-82) After the prosecution published the statement to the members of the court-martial panel (jurors), he also testified about its contents. (R. at 82-88)

Under military law, a confession must be independently corroborated. In an attempt to corroborate Airman First Class Bridges' statement, the prosecution called his wife, Julia. (R. at 102) In front of the panel members, she responded to ten questions from the prosecutor regarding facts and circumstances surrounding the charged offenses by saying, "I refuse to say anything, sir." (R. at 103-104) She also gave the same answer to the military judge.

The military judge then excused the panel members from the courtroom and convened a hearing under Article 39(a), U.C.M.J. (10 U.S.C. § 839(a)). After ensuring that Julia would not answer any questions despite the threat of contempt, the following occurred:

> **Military Judge**: Okay. Anything anybody else wants to ask of this witness before I let her depart the courtroom?
> **Defense Counsel**: No, your Honor.
> **Military Judge**: Okay. (to the witness) Thank you. I think you can go back wherever they had you waiting, Okay? (R. at 106)

After Julia was excused from the courtroom, the military judge asked the defense counsel whether the witness was refusing to testify because of the "relationship" with her husband. The defense counsel stated that that was "correct." *Id.* However, the prosecution specifically conceded that the defense had played no role in Julia's decision not to testify. (R. at 109)

Over defense objection, the prosecution moved to admit Julia's sworn written statement to law enforcement officials under the provisions of Military Rule of Evidence (MRE) 804(b)(5), the residual hearsay exception. (R. at 106-107) Citing corroborating factors to support its credibility, the military judge then admitted the statement under the residual hearsay exception. (R. at 16; App. Ex. XVI) *Id.*

REASON FOR GRANTING THE WRIT

In its decision below, the United States Court of Appeals for the Armed Forces concluded that the physical production of Julia on the witness stand, and the "opportunity" afforded the defense to question her at the Article 39(a) hearing satisfied the requirements of the Sixth Amendment's Confrontation Clause. 55 M.J. at 62. In so holding, the Court of Appeals for the Armed Forces has concluded that physical production of a witness alone, without regard to the opportunity to meaningfully cross-examine that witness, satisfies the requirements of the Confrontation Clause. Moreover, the lower court has expanded the waiver of in-court confrontation to situations in which the defendant has *not* contributed to the unavailability of the witness. This approach is in substantial conflict with this Honorable Court's Sixth Amendment jurisprudence.[2]

The Sixth Amendment right to confront and cross-examine witnesses applies to members of the armed forces. *United States v. Stombaugh*, 40 M.J. 208, 212 (CMA 1994). This right guarantees that a criminal defendant shall have the right "to be confronted with the witnesses against him." U.S. CONST. AMEND. VI. It was clearly intended to exclude some hearsay evidence and prevent trial by affidavit. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980); *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934).

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[2] Two members of the court below recognized the problematic nature of the majority's holding and refused to affirm based on a waiver of the Sixth Amendment. Rather, they each concluded that the statement satisfied the confrontation clause under *Idaho v. Wright*, 497 U.S. 805 (1990). 55 M.J. at 64, 66.

In addition, "the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured [by the provision] is the right of cross-examination.'" *Roberts*, 448 U.S. at 63 (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)). Such a means of testing the accuracy of testimony is "so important that the absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact finding process.'" *Roberts*, 448 U.S. at 64 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), and *Berger v. California*, 393 U.S. 314, 315 (1969)).

This Honorable Court has held that there is a presumption against the waiver of Constitutional rights. *Brookhart v. Janis*, 384 U.S. 1 (1966); *Glasser v. United States*, 315 U.S. 60, 70-71 (1942). In order for a waiver to be effective, it must be clearly established that there was "an *intentional* relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)(emphasis supplied); *Barber v. Page*, 390 U.S. 719, 725 (1968). Because the right of confrontation is personal and fundamental, counsel cannot waive it. *Clemmons v. Delo*, 124 F.3d 944, 956 (8th Cir. 1997). Rather, the waiver must be either express or through the accused's intentional misconduct. *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996).

Courts have found waiver in situations in which the defendant intentionally procures the witness' unavailability. *See, e.g. Reynolds v. United States*, 98 U.S. 145, 158 (1878)(refusal to disclose witness' whereabouts

waived confrontation); *United States v. White*, 116 F.3d 903 (DC Cir. 1997)(confrontation waived where defendant procured unavailability by murdering witness); *Houlihan*, 92 F.3d at 1279(holding that defendant waived his right of confrontation by murdering a potential witness during the ongoing police investigation); *Steele v. Taylor*, 684 F.2d 1193, 1201-02 (6th Cir 1982)(confrontation waived where accused silences a witness by exploiting an intimate relationship); *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979)(procuring a witness' silence by threatening his life waives confrontation). The concerted actions of a defendant's family members in refusing to testify, however, do not waive confrontation absent a specific factual finding that the family member is being controlled by the accused. *United States v. Hines*, 23 M.J. 125 (CMA 1986).

This Honorable Court noted that the "guarantees of trustworthiness" required for admission of hearsay statements is not called for "when the hearsay declarant is present at trial *and subject to unrestricted cross-examination.*" *United States v. Owens*, 484 U.S. 554, 560 (1988)(emphasis supplied) The failure to cross-examine a witness at a preliminary hearing does not waive the right of confrontation at trial. *Barber*, 390 U.S. at 725. There appear to be no cited cases involving a failure to cross-examine a witness during an interlocutory hearing. However, the two hearings are analogous for purposes of evaluating the Sixth Amendment. Like a preliminary hearing, an interlocutory hearing such as an Article 39(a) session is not a "searching exploration into the merits of a case." *Id.*

In this case, the trial court's offer to question a witness in an interlocutory Article 39(a) hearing called for the specific purpose of determining the witness' willingness to testify cannot be equated to an opportunity to effectively confront the witness within the meaning of the Sixth Amendment. The merits of the case were not at issue during the Article 39(a) session, as the only issue was whether the Petitioner's wife would testify. The members (jurors) were absent at the time of the proffer. Thus, the Petitioner was not provided an opportunity to subject the witness to unrestricted cross-examination because she refused to answer any questions. "To suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation...hardly comports with [the] definition of a waiver as 'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* (quoting *Zerbst*, 304 U.S. at 464); *Brookhart*, 384 U.S. at 4.

Moreover, the prosecution conceded at trial that the Petitioner played no role in Julia's refusal to testify. This is not a case in which Petitioner's misconduct, or his tactics at trial, procured Julia's unavailability. Though it may have been advantageous to Petitioner not to have Julia testify, that tactical reality alone is not sufficient to constitute an "intelligent and knowing" waiver of a Constitutional right.

CONCLUSION

The decision of the United States Court of Appeals for the Armed Forces represents a significant departure from this Honorable Court's Sixth Amendment jurisprudence.

Therefore, Petitioner respectfully requests this Honorable Court grant his petition for a writ of certiorari.

Respectfully submitted,

TIMOTHY W. MURPHY
Lt Colonel, United States Air Force
Chief, Appellate Defense Counsel
Counsel of Record

BEVERLY B. KNOTT
Lt Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel for Petitioner

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, D.C. 20332-8000
(202) 767-1563

August 2001

Appendix A

UNITED STATES, Appellee

v.

Shawn T. BRIDGES, Airman First Class, U. S. Air Force

No. 00-0456
Crim. App. No. 33369

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

55 M.J. 60

December 5, 2000, Argued
May 29, 2001, Decided

For Appellant: *Major Steven P. Kelly (argued); Colonel James R. Wise and Lieutenant Colonel Timothy W. Murphy (on brief).*

For Appellee: *Captain James C. Fraser (argued); Colonel Anthony P. Dattilo, Lieutenant Colonel William B. Smith and Major Lance B. Sigmon (on brief).*

JUDGES: CRAWFORD, C.J., delivered the opinion of the Court, in which GIERKE and EFFRON, JJ., joined. SULLIVAN and BAKER, JJ., each filed an opinion concurring in the result.

Chief Judge CRAWFORD delivered the opinion of the Court.

Contrary to his pleas, appellant was convicted in June 1998 by officer and enlisted members of assaulting his 22-month-old daughter and 9-month-old son, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 USC § 928. The convening authority approved a sentence of a bad-conduct discharge, 6 months' confinement, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence. 52 M.J. 795 (2000).

We granted review of the following issues:

I. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD THAT APPELLANT WAIVED HIS SIXTH AMENDMENT RIGHT TO CONFRONT JULIA BRIDGES, THE PROSECUTION'S KEY WITNESS.

II. WHETHER APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS VIOLATED WHEN HIS WIFE'S STATEMENT TO LAW ENFORCEMENT INVESTIGATORS WAS ADMITTED UNDER MILITARY RULE OF EVIDENCE 804(b)(5).

Based upon *United States v. McGrath*, 39 M.J. 158 (CMA 1994), we hold that the court below did not err, and there is no violation of appellant's Sixth Amendment right to confront and cross-examine Mrs. Bridges.

FACTS

During the findings portion of the trial, Mrs. Bridges was called as a prosecution witness. She gave her name, her address, and length of residency at that address. However, when she was asked, "Do you remember going to your neighbor's house...your husband hitting you that night...slapping you that night?" and other questions, she refused to answer. The judge then dismissed the court members and held a session under Article 39(a), UCMJ, 10 USC § 839(a).

At that session, Mrs. Bridges told the judge "it doesn't matter" whether she's ordered to testify or not, she will refuse to testify. The witness also stated that even if she were held in contempt, she would not respond to the judge's questions. Near the end of this session, after Mrs. Bridges said she was not willing to answer "any of the questions that [the prosecutor] poses to [her]," the judge asked, "Anything anybody else wants to ask of this witness before I let her depart the courtroom?" The defense responded, "No, Your Honor."

The judge then asked defense counsel, "Are they in the process or – being just separated or what?" The defense counsel responded, "They are still married and they intend to remain married." The defense also responded she did not want "to testify [based on] the relationship with her husband." Later, when arguing the admissibility of a prior statement made by Mrs.

Bridges to law enforcement officers on December 8, 1997, the defense indicated they would challenge Mrs. Bridges' competency. At that time, the judge gave the defense the opportunity to call her "back up here" as a witness, but the defense declined that invitation.

After this conversation, the judge determined that Mrs. Bridges was "unavailable" to testify and admitted her prior statement under the residual hearsay exception of Mil.R.Evid. 804(b)(5), Manual for Courts-Martial, United States (1998 ed.)[1] To support its admission, the judge found that the following factors supported the conclusion that the statement possessed guarantees of trustworthiness:

(1) Appellant's statement corroborated Mrs. Bridges' statement;
(2) The neighbors heard the children screaming;
(3)Mrs. Bridges "ran to a neighbor's house and reported abuse by the accused;"
(4) She was "hysterical" at the time;
(5) Mrs. Bridges reported the abuse to the doctor; and
(6) Treatment was sought at the hospital for Mrs. Bridges' two children.

After appellant's conviction and during the sentencing stage, the defense sought to introduce a second statement made by Mrs. Bridges on June 15, 1998. Trial counsel responded:

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[1] Now Mil.R.Evid. 807.

> Ma'am, for that one, we do have an objection. My concern is, of course, although we called her as a witness, she was unavailable, she won't testify. She said she won't testify. And if I called her back to cross-examine her about the contents of the letter or her bias or her motive, which will go into the allegations again, she won't testify.

Thereafter, the following discussion took place between defense counsel and the military judge:

> DC: Your Honor, I believe that Captain Spath [the prosecutor] would have a valid point if she went in and discussed the events. However, she states very clearly that she's talking about the impact that this will have upon her family. This is clearly matters in mitigation. While Captain Spath may be unhappy that he can't cross-examine her about areas that are not included in this statement, under the rēlaxed rules of sentencing, I don't think that's a valid reason to keep this out. She does not go into the areas that he's mentioned that he wants to cross-examine her about.
>
> MJ: Well, but that's the point. He's saying the statement's one-sided. She's talking about all the stuff with the child and the impact, and yet, he can't go into what was the impact at the time or what--you know, what was going on with the children.
>
> * * *

MJ: Well, she needs to rethink--and I understand that she didn't, but, you know, Captain Spath has the opportunity to call her back and she needs to be prepared and come--and he has the opportunity to present rebuttal and to cross-examine her about this...Mrs. Bridges needs to make a decision[.]

* * *

DC: Well, ma'am, you know, there's an easy way to resolve this. She's here in this courtroom, she's heard all this discussion, we can call her to the stand right now and we can ask her what she would do and you could instruct her that if she is going to be willing to answer questions, that she can't stop in the middle, as Captain Spath just suggested.

MJ: Well, I can't stop her from not stopping in the middle [sic]. I just won't let you give them the exhibit [Mrs. Bridges' statement made June 15, 1998] until she's answered questions. It's that simple. Because--are you going to call or Spath going to call her to answer questions? You're not planning on calling her, right?

DC: I was not planning on calling her.

DISCUSSION

The Sixth Amendment provides in part that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him," together with "the right...to have compulsory process for obtaining witnesses in his favor..." Article 39(a)(4) provides for the "presence of the accused," and Article 46, UCMJ, 10 USC § 846, states that "the defense counsel...shall have equal opportunity to obtain witnesses and other evidence..."

If the right of confrontation and cross-examination means anything, it means that the prosecution must present the hearsay declarant at trial in an attempt to elicit the out-of-court statement directly from the witness's lips while on the witness stand and under oath. That was done in this case.

The genesis for the current Sixth Amendment interpretation is found in Justice Harlan's concurring opinion in *California v. Green*, 399 U.S. 149, 172, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970).[2] With *Green* as a roadmap, in *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), the Supreme Court declared "a *preference* for face-to-face confrontation at trial." Id. at 63 (emphasis added). The Court held that hearsay is admissible when the witness is unavailable and the hearsay either "falls within a firmly rooted hearsay

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[2] In *United States v. Owens*, 484 U.S. 554, 559, 98 L. Ed. 2d 951, 108 S. Ct. 838 (1988), the majority of the Court expressly adopted Justice Harlan's concurring opinion in *Green*.

exception," *see, e.g., White v. Illinois*, 502 U.S. 346, 355, 116 L. Ed.2d 848, 112 S. Ct. 736 (1992), or has "particularized guarantees of trustworthiness," *see, e.g., Idaho v. Wright*, 497 U.S. 805, 820, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990). 448 U.S. at 66. "The Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* at 65.

The Supreme Court has used a "cost benefit" analysis when balancing witness unavailability with the "'Confrontation Clause's very mission' which is to 'advance "the accuracy of the truth-determining process in criminal trials."'" *United States v. Inadi*, 475 U.S. 387, 396, 89 L. Ed. 2d 390, 106 S. Ct. 1121 (1986), quoting *Tennessee v. Street*, 471 U.S. 409, 415, 85 L. Ed. 2d 425, 105 S. Ct. 2078 (1985), quoting *Dutton v. Evans*, 400 U.S. 74, 89, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970). *See also United States v. Johnston*, 41 M.J. 13 (CMA 1994) (purpose of a trial is truth-finding within constitutional, statutory, and ethical constraints).

The unavailability requirement is inapplicable in some situations, for example, where the utility of confrontation is "remote," *Roberts*, 448 U.S. at 65 n.7, or the exception is "firmly rooted," as in statements of co-conspirators, *Inadi, supra;* declarations against interest,

United States v. Jacobs, 44 M.J. 301 (1996)[3]; dying declarations; business records; and public records, 448 U.S. at 66 n.8. Conversely, the residual hearsay exception is not firmly rooted--thus, the requirement to establish unavailability and particularized guarantees of trustworthiness. *Idaho v. Wright, supra.*

A witness is unavailable when she "persists in refusing to testify concerning the subject matter of [her] statement despite an order of the military judge to do so..." Mil.R.Evid. 804(a) In this case, appellant's wife was called to the witness stand and stated her name, address, and how long she had been living at that address. Then she told the judge that she would not testify, even if ordered to do so. Only after her refusal to testify further and defense counsel's declination of the opportunity to cross-examine her was the prosecution allowed to introduce her statement given to law enforcement officials on December 8, 1997. The prosecution was not responsible for the unavailability resulting from the refusal of the witness to testify. *See, e.g.,Berger v. California,* 393 U.S. 314, 21 L. Ed. 2d 508, 89 S. Ct. 540 (1969); *Barber v. Page*, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968). Mrs. Bridges was, in effect, invoking her "marital privilege."

This case is strikingly similar to *United States v. McGrath, supra,* and *United States v. Martindale*, 40 M.J. 348 (CMA 1994). In both of these cases, we held that

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[3] We need not decide if Mrs. Bridges' statement was a declaration against interest and, thus, a firmly rooted exception to the hearsay statement.

when a witness is present and confrontation is not at issue, the judge may employ extrinsic circumstances to corroborate the witness's prior statement the proponent seeks to admit.

In *McGrath*, the accused's 14-year-old daughter, A, was called by the prosecution as a witness. When asked if she had made statements implicating appellant, A refused to answer. Additionally, she refused to retract or confirm her prior statements. A admitted that she appeared in court because she received a German subpoena. A said she did not want to testify because she wanted to avoid any potential harm to her father. Just as in the case *sub judice*, when the military judge concluded his questioning of A's daughter, he offered defense counsel an opportunity to question the witness, and defense counsel declined. 39 M.J. at 159-61. Likewise, in *Martindale*, there was a voluntary confession, and the witness-declarant was tendered to the defense, but they expressly waived the right to confront the witness at trial. 40 M.J. at 349.

Just like the witness in *McGrath*, Mrs. Bridges was present, was placed under oath, and gave identifying information but refused to respond to additional questions. When defense counsel was asked whether they had any questions for Mrs. Bridges, they replied in the negative. Additionally, defense counsel informed the judge that Mrs. Bridges would not testify because she intended to remain married to appellant and her refusal to testify was motivated by this relationship. The defense said that they had talked with Mrs. Bridges and knew her desires.

During sentencing, the defense noted that she was willing to testify in mitigation about the "impact" the findings would have upon her family. The judge told defense counsel that Mrs. Bridges "needs to make a decision" about whether she will be subject to cross-examination. The defense said that decision will be easy because "she's here in this courtroom, she's heard all this discussion." The defense then stated that they were not planning to call her as a witness. They only wanted to introduce her written statement. However, the judge ruled that unless Mrs. Bridges would be willing to be called and be subject to cross-examination, she would not admit the written statement. Ultimately, the statement was not admitted.

Just as in *McGrath*, "it is clear that examination of the victim, direct or cross, was the very last thing on earth the defense wanted to have happen. Having thus eschewed confrontation, appellant cannot now claim a denial of it." 39 M.J. at 163. We agree with the Court below:

> Had the defense made a sincere effort to examine the witness and she still refused to testify, the issue would be different. However, when a witness is produced at trial and the defense makes no effort at all to avail of the opportunity thereby provided to test the recollection and conscience of the witness, it is clear that the defense waives cross-examination. And, that waiver of cross-examination satisfies the [unavailability] requirements of the Confrontation Clause. 52 M.J. at 800.

As in *McGrath*, "the Government did not seek to rely on paper evidence, but rather produced the witness." 39 M.J. at 163. Thus, we hold that it was appropriate for the judge to consider factors outside the making of the statement to establish the reliability of Mrs. Bridges' December 8, 1997, statement to law enforcement officials and to admit her statement during the prosecution's case-in-chief.

This is not the case of a witness who was absent. In fact, Mrs. Bridges was present and on the witness stand during the case-in-chief, and present in the courtroom during sentencing. Nor is this a case where the defense made any attempt to impeach the pretrial statement of Mrs. Bridges. This is a case of a witness trying to protect her interests, and by so doing, allowing appellant now to use the lack of cross-examination as a sword. This is a witness who was made available, but for reasons known to her, defense counsel, and possibly appellant, was unwilling to testify. In summary, it is enough that appellant and defense counsel were brought face-to-face with the witness and given an opportunity to ask the judge to order her to testify, encourage her to testify, cross-examine her, or offer evidence to discredit the pretrial statement. The defense took none of these actions.

DECISION

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

CONCUR: SULLIVAN, Judge (concurring in the result):

I vote to affirm this case, but I do so via a different path. I do so since the majority opinion's approach to this case troubles me. It first suggests that appellant's constitutional right to confrontation was not an issue because Mrs. Bridges was called to the stand as a witness prior to the admission of her hearsay statement under Mil.R.Evid. 804(b)(5). 55 MJ at 63-64. A similar question was addressed by the Supreme Court in *United States v. Owens*, 484 U.S. 554, 98 L. Ed. 2d 951, 108 S. Ct. 838 (1988). See also *Delaware v. Fensterer*, 474 U.S. 15, 88 L. Ed. 2d 15, 106 S. Ct. 292 (1985). There, the Supreme Court said that the constitutionally required "guarantees of trustworthiness" are not "called for when a hearsay declarant is present at trial *and subject to unrestricted cross-examination.*" 484 U.S. at 560 (emphasis added). Clearly, Mrs. Bridges was not subject to unrestricted cross-examination in this case because she refused to answer any questions. *See United States v. Vernor*, 902 F.2d 1182, 1186 (5th Cir. 1990) (hearsay statement of witness who asserted Fifth Amendment privilege subject to constitutional standard of trustworthiness). Even *United States v. McGrath*, 39 M.J. 158, 163 (CMA 1994), recognized this point.

Merely bringing an appellant and witness face-to-face and asking the judge to order a recalcitrant witness to testify does not constitute an effective or meaningful opportunity for cross-examination. The prosecution had elicited precious little information

about Julia Bridges that could be questioned by defense counsel. Requiring a defense counsel in this situation to conduct a pointless cross-examination (or, alternately, asking the judge to order the witness to testify) in order to preserve an accused's confrontation rights is equally hollow, i.e., "The law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980). A need for a constitutional showing of trustworthiness existed in this case. *See United States v. Vernor, supra.*

Next, the majority opinion appears to hold that there is no constitutional confrontation issue in this case because appellant waived his right to cross-examine Mrs. Bridges. Its analysis focuses on the decision of this Court in *United States v. McGrath, supra,* but overlooks applicable Supreme Court precedent on waiver of the constitutional right to confrontation. *See Brookhart v. Janis*, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966). I find this approach unsatisfactory.

In *Brookhart v. Janis*, the Supreme Court addressed waiver of the right to confrontation as follows:

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, *see, e.g., Glasser v. United States*, 315 U.S. 60, 70-71, 86 L. Ed. 680, 62 S. Ct. 457, and for a waiver to be effective it must be clearly established that there was "an intentional

> relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019.
>
> In deciding the federal question of waiver raised here we must, of course, look to the facts which allegedly support the waiver. Upon an examination of the facts shown in this record, we are completely unable to agree with the Supreme Court of Ohio that the petitioner intelligently and knowingly waived his right to cross-examine the witnesses whose testimony was used to convict him.

384 U.S. at 4-5 (footnote omitted).

Turning to the facts of appellant's case, as described by the majority opinion, I see no waiver by appellant of his right to cross-examine his wife. More is required than a failure of defense counsel to cross-examine the witness. *See Hawkins v. Hannigan*, 185 F.3d 1146, 1155 n.5 (10th Cir. 1999), citing *Cruzado v. People of Puerto Rico*, 210 F.2d 789, 791 (1st Cir. 1954)(approving waiver by defense counsel stipulation); *United States v. Figueroa*, 976 F.2d 1446, 1457 (1st Cir. 1992). Here defense counsel was told in advance by the witness that she would answer no questions. There was no stipulation in this case, and I see no strategic inaction in his subsequent failure to question this recalcitrant witness. *United States v. McGrath, supra* at 170 (Sullivan, J.,dissenting) (defense offered chance to cross-examine victim but declined after witness asserted that she would not answer).

Since I see a confrontation issue in this case, my remaining question is whether there were particular guarantees of trustworthiness surrounding the making of Mrs. Bridges' out of court statement which warranted its admission at appellant's court-martial. In my view, *Idaho v. Wright*, 497 U.S. 805, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990), not *McGrath or United States v. Martindale*, 40 M.J. 348 (CMA 1994), controls.

Here, there were several factors surrounding the making of her statement Which provided the necessary particularized guarantees of trustworthiness. Mrs. Bridges' statement was handwritten shortly after the alleged incident on December 8, 1997; it was made to security forces called to the scene by Annette Richner at the request of Mrs. Bridges; Ms. Richner also said Mrs. Bridges was hysterical shortly after the alleged incident before making the statement; another witness stated that she heard appellant yelling at his daughter through the wall of their duplex-type, on-base residence shortly before her statement was made; and finally, evidence was admitted that Mrs. Bridges made a second consistent statement at Abilene Regional Hospital, 90 minutes later, when she sought medical treatment for her two children. *See United States v. Orena*, 32 F.3d 704, 712 (2d Cir. 1994) (statements made during life and death battle); *United States v. Bradley*, 145 F.3d 889, 895 (7th Cir. 1998) (admission of wife's statement to officers responding to emergency call satisfies *Idaho v. Wright*); cf. *United States v. Mitchell*, 145 F.3d 572, 579 (3d Cir. 1998) (admission of anonymous note violates *Idaho v. Wright*).

BAKER, Judge (concurring in the result):

For the reasons stated by Judge Sullivan, I do not believe the record reflects that appellant waived his right to cross-examine Mrs. Bridges. Although it may have been to appellant's immediate tactical advantage not to cross-examine Mrs. Bridges, where, as here, it was apparent to all present that Mrs. Bridges would not testify, we should not place form over substance and require defense counsel to engage in a charade in order to preserve the constitutional right of cross-examination. As Judge Sullivan has observed elsewhere, defense counsel's position on cross-examination may well change in response to a military judge's ruling on the admission of an out of court statement. *United States v. McGrath*, 39 M.J. 158, 170 (CMA 1994) (Sullivan, J., dissenting). Nonetheless, I concur in the result.

In this case, the military judge correctly determined that Mrs. Bridges was not available for the purpose of cross-examination and, therefore, the Government established the necessity of introducing her out-of-court statement into evidence. And, although the judge's ruling was in response to the attempts of trial counsel to question Mrs. Bridges, her ruling on availability was not limited to the Government. The military judge also correctly determined that Mrs. Bridges' statement carried adequate indicia of reliability. This is true whether this Court relies on waiver and *McGrath* (relying on particularized guarantees of trustworthiness from

corroborating evidence unrelated to the making of the statement), or as Judge Sullivan and I argue, in the absence of waiver, the Court limits its inquiry to indicia of reliability surrounding the making of the statement itself. *Idaho v. Wright*, 497 U.S. 805, 820, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990).

The judge's findings of fact and conclusions of law regarding admissibility satisfy both tests. The particularized guarantees of trustworthiness surrounding the making of Mrs. Bridges' statement include the following: her statement was made under oath; her statement was made "within fairly close proximity" to the events in question; and her statement was against her own pecuniary interest, evidenced in part by her subsequent refusal to testify.* In light of these factors, it is not necessary to look to additional extrinsic circumstantial guarantees of trustworthiness, such as the observations of Mrs. Bridges' neighbors; the circumstances surrounding her response to security forces; or statements made to the attending physician when she sought treatment for her two children.

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* I leave for another day, whether this latter factor alone would have warranted admission of Mrs. Bridges' statement as a firmly rooted hearsay exception. *Id.* at 815.

Appendix B

UNITED STATES
v.

Airman First Class SHAWN T. BRIDGES,
United States Air Force

ACM 33369

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

52 M.J. 795

March 7, 2000, Decided

Sentence adjudged 17 June 1998 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Mary M. Boone. Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: *Major Stephen P. Kelly (argued), Colonel Jeanne M. Rueth, Colonel Theodore J. Fink, Colonel Douglas H. Kohrt, Lieutenant Colonel James R. Wise, and Major Carol L. Hubbard.*
Appellate Counsel for the United States: *Captain James C. Fraser (argued), Colonel Anthony P. Dattilo, and Lieutenant Colonel Ronald A. Rodgers.*

Before YOUNG, Senior Judge, BURD and ROBERTS, Appellate Military Judges.

OPINION OF THE COURT

BURD, Judge:

On 16 and 17 June 1998, the appellant was tried by general court-martial composed of officer and enlisted members at Dyess Air Force Base (AFB), Texas. Contrary to his pleas, he was found guilty of two specifications of battery upon a child on divers occasions, in violation of Article 128, UCMJ, 10 U.S.C. § 928. He was sentenced to a dishonorable discharge, confinement for 6 months, and reduction to E-1. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 6 months, and reduction to E-1.

The appellant asserts five errors. We find no error and affirm the findings and sentence. We begin with a brief statement of the facts.

The appellant lived in government quarters on Dyess AFB with his wife, twenty-two-month-old daughter, and nine-month-old son. The appellant's offenses came to light on 8 December 1997, when his wife made a written, sworn statement to military law enforcement authorities which detailed the appellant's history of emotional and physical abuse of her and their two children. The appellant was then interviewed, under a proper rights advisement, and confessed, in writing, to multiple batteries on his two children and shoving his wife when she intervened during a battery upon the daughter.

The prosecution's evidence at trial consisted of the appellant's written confession, the testimony of an Air Force Office of Special Investigations agent regarding the interview and confession of the appellant, the written statement of the appellant's wife, the testimony of a neighbor regarding the appellant's wife appearing at her door in an excited state on two occasions describing the appellant's violent outbursts, the testimony of a neighbor who lived in the adjacent housing unit regarding occasions where she heard through the common wall the appellant yelling at his daughter to stop crying and at times the baby's cries stopping abruptly and, a stipulation of expected testimony of a physician about his examination of the appellant's two children on 8 December 1997, and about remarks made by the wife about the appellant's physical abuse of their children.

I. Admission of Wife's Statement

The first issue presented is whether the appellant's Sixth Amendment right to confront witnesses against him was violated when his wife's statement to law enforcement investigators was admitted under Mil. R. Evid. 804(b)(5).[1] We hold it was not.

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[1] As a part of our Project Outreach Program, the Court heard oral argument on this issue at Randolph AFB, Texas, on 25 January 2000.

At trial, the prosecution called the appellant's wife to the stand to testify. She was placed under oath and asked several questions by the trial counsel. After answering the trial counsel's preliminary questions about her identity, she refused to answer questions about the night of 8 December 1997, her written statement on that evening, and the substance of her allegations from that statement. To each question she answered: "I refuse to say anything, sir." At the request of the trial counsel, the military judge ordered the witness to answer the questions, to whom she responded: "I refuse to say anything, ma'am." The members were then excused and, in an exchange with the military judge, the wife admitted that she knew she could be held in contempt, but that she was refusing to testify. When asked by the military judge whether anyone had any other questions before she let the witness leave the courtroom, the trial defense counsel answered: "No, your honor."

The appellant's wife was excused from the courtroom. The military judge then raised the possibility of asking the wife additional questions about whether the appellant and his wife were getting a divorce or just separated. The trial defense counsel stated: "Your Honor, no, they are still married and they intend to remain married." The military judge then asked: "I probably should have asked her a few more questions, but I understand that part of the reason she may not want to testify is the relationship with her husband?" The trial defense counsel responded: "That's correct, Your Honor."

The military judge was then told that the appellant's wife had refused to testify at the Article 32 Investigation. When the military judge asked for the defense position on the offered statement, the trial defense counsel stated: "Your honor, I'm not going to have a foundation objection. I am, obviously, going to have an objection based on hearsay." The military judge found the appellant's wife unavailable and admitted her written statement under the residual hearsay rule, Mil. R. Evid. 804(b)(5).

We note, at the outset, that the appellant has not raised an issue before this Court of whether the military judge abused her discretion in admitting the appellant's wife's statement under the residual hearsay rule. The appellant's claim of error in admitting the statement rests solely upon the Confrontation Clause of the Sixth Amendment, which requires that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him[.]" U.S. Const. amend. VI.

The narrowing of the issue presented raises an important distinction—the Confrontation Clause and the hearsay rules, while intended to protect similar values, require separate analysis to gauge whether particular circumstances transgress their individual requirements. Admission of a statement may fall within the permissible limits of a hearsay exception yet fall outside the requirements of the Confrontation Clause. The converse is also true. *Dutton v. Evans*, 400 U.S. 74, 86, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970);

California v. Green, 399 U.S. 149, 155, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970).

The Sixth Amendment enumerates specific rights enjoyed by all those accused in criminal prosecutions that are fundamental to the integrity of our judicial process. As with the other rights enumerated in the Sixth Amendment, the confrontation requirement enhances the reliability of the result of trial. Production of a witness at trial provides an accused an opportunity to test the recollection and conscience of the witness and compels the witness to stand personally before the trier of fact to be judged for worthiness of belief. *Mattox v. United States*, 156 U.S. 237, 242, 39 L. Ed. 409, 15 S. Ct. 337 (1895). *See also United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982).

The Confrontation Clause does not require the actual production of all witnesses in every case. Just as the traditional hearsay rule has recognized exceptions, the Confrontation Clause permits the admission of hearsay when such admission does not offend the purposes for which the clause exits. (sic) *See Lilly v.Virginia*, 527 U.S. 116, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999); *Idaho v.Wright*, 497 U.S. 805, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990); *see also United States v. Owens*, 484 U.S. 554, 98 L. Ed. 2d 951, 108 S. Ct. 838 (1988); *Delaware v. Fensterer*, 474 U.S. 15, 88 L. Ed. 2d 15, 106 S. Ct. 292 (1985); *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980); *Green; Pointer v. Texas*, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965); *Mattox. See generally* J. Strong, *McCormick on Evidence* § 252 (5th ed. 1999).

In *Wright*, the Supreme Court reviewed the accepted approach to confrontation-hearsay analysis:

> In *Ohio v. Roberts*, we set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. 448 U.S. at 65. We noted that the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay." *Ibid.* "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case..., the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Ibid.* (citations omitted). Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66 (footnote omitted); *see also Mancusi v. Stubbs*, 408 U.S. 204, 213, 33 L. Ed. 2d 293, 92 S. Ct. 2308, (1972).

Wright, 497 U.S. at 814-15.

The *Wright* majority went further, stating what has become the core holding of the opinion: "We agree that 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 819. "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 822.

The essence of the appellant's claim in this case is that, since the military judge considered corroborating evidence beyond the circumstances surrounding the making of the wife's statement in admitting the statement under the residual hearsay rule, such admission was in violation of the Confrontation Clause even though it was in compliance with Mil. R. Evid. 804(b)(5). The appellant's position lacks persuasive merit because it ignores the significance of the trial defense counsel's trial tactics and disregards the decisions of the United States Court of Appeals for the Armed Forces that provide compelling authority for our holding that the Confrontation Clause was satisfied in this case when the appellant's wife took the stand, was placed under oath, and the trial defense counsel elected to conduct no examination of the witness.

The government is required to take all reasonable means to obtain the presence of crucial

witnesses before substitutes for their live testimony will be considered. *United States v. McGrath*, 39 M.J. 158, 163 (C.M.A. 1994); *see also United States v. Cokeley*, 22 M.J. 225 (C.M.A. 1986); *United States v. Hinton*, 21 M.J. 267 (C.M.A. 1986). The government satisfied this requirement. Not only was the witness called to the stand, placed under oath, and asked several questions by the trial counsel, but the military judge also asked her questions about testifying, ordered her to answer the questions posed to her, and advised her that she could be held in contempt.[2]

The appellant had numerous opportunities to cross-examine the witness. At every one of those opportunities, the trial defense counsel demonstrated a complete disinterest in having his client's wife utter a single word. We find the irony of the defense tactics revealing. The trial defense counsel was quick to point out that there was no evidence to suggest the defense was responsible for procuring the wife's recalcitrance, thus avoiding a ruling that the appellant waived confrontation by causing the wife's unavailability. *See McGrath*, 39 M.J. at 163; *United States v. Hines*, 23 M.J. 125, 132 (C.M.A. 1986); *Thevis*, 665 F.2d at 632-33. During sentencing, the defense offered a written statement of the appellant's wife dated the day before trial. The defense withdrew the exhibit when the

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[2] Contempt power under military law is severely limited and does not extend to a simple refusal to testify. Article 48, UCMJ, 10 U.S.C. § 848; Rule for Courts-Martial (R.C.M.) 809. The proper recourse would have been prosecution in a United States district court. Article 47, UCMJ, 10 U.S.C. § 847.

military judge made it clear that admission of the statement was contingent on the wife making herself available to testify. The trial defense counsel volunteered that the withdrawal of the exhibit was a tactical decision and not based on any conversations with the appellant's wife.

The significance of the defense trial tactics is not that such tactics imply responsibility for the wife's unavailability. Rather, the tactics show that the defense carefully avoided examination of the appellant's wife. As stated in McGrath, "it is clear that examination of the victim, direct or cross, was the very last thing on earth the defense wanted to have happen. Having thus eschewed confrontation, appellant cannot now claim a denial of it." *McGrath*, 39 M.J. at 163.

Had the defense made a sincere effort to examine the witness and she still refused to testify, the issue would be different. However, when a witness is produced at trial and the defense makes no effort at all to avail of the opportunity thereby provided to test the recollection and conscience of the witness, it is clear that the defense waives cross-examination. And, that waiver of cross-examination satisfies the requirements of the Confrontation Clause. *Id.* at 163.

We conclude that, since the Confrontation Clause was satisfied, the military judge properly considered the totality of the circumstances, including relevant circumstances outside those that surrounded the making of the statement by the appellant's wife, in determining the statement's admissibility. *Id.* at 163-67.

See United States v. Johnson, 49 M.J. 467 (1998); *see also United States v. Lyons*, 36 M.J. 183, 188 (C.M.A. 1992) (Crawford, J., concurring in the result); *United States v. Clark*, 35 M.J. 98, 107 (C.M.A. 1992) (Crawford, J., concurring). The decision of the military judge to admit the statement under Mil. R. Evid. 804(b)(5) was not an abuse of discretion. *United States v.Johnson*, 46 M.J. 8 (1997).

II. Acceptance of the Stipulation of Expected Testimony

The second issue presented is whether acceptance of the stipulation of expected testimony of Dr. Mitchell R. Moriber was error that materially prejudiced the appellant's substantial rights where the testimony included hearsay statements of the appellant's wife who was unavailable at trial. The core of the appellant's claim is that admission of the stipulation of expected testimony violated his right to confront the declarant--his wife. We conclude that the appellant affirmatively waived any objection to the admission of the stipulation of Dr. Moriber's expected testimony.

A stipulation of expected testimony does not admit the truth of the indicated testimony nor does it add anything to the evidentiary nature of the testimony. Rule for Courts-Martial (R.C.M.) 811(e). In this case, the appellant's wife's statements to Dr. Moriber are equally hearsay whether referred to in direct testimony or in a stipulation of expected testimony.

While mindful of this, our focus is on the meaning and effect of the defense tactical decision to agree to inclusion of hearsay in a stipulation of expected testimony and permitting its acceptance by the court without objection. This is not a case where the defense was coerced into an unfavorable stipulation to secure the benefit of a pretrial agreement. We have previously viewed such arrangements with disfavor. *See United States v. Keith*, 17 M.J. 1078 (A.F.C.M.R. 1984). *See also United States v. Rasberry*, 21 M.J. 656 (A.C.M.R. 1985). This is also not a case where the military judge did not give the appellant an informed opportunity to withdraw from the stipulation. *See United States v. Gonzalez*, 14 M.J. 501 (A.F.C.M.R. 1982). The military judge conducted the proper inquiry with the appellant to verify that he understood the substance of the stipulation of expected testimony, its purposes and uses, the appellant's options, and that the appellant fully agreed to its use.

Moreover, it was obvious to the participants in this case that when the stipulation of expected testimony was agreed to and accepted without objection, the government would not need to call the appellant's wife to testify about her statements to Dr. Moriber. There is nothing in the record to suggest that the appellant did not understand or agree to this result.

When the defense freely stipulates to what a witness would testify, the defense waives confrontation on the matters contained in the stipulation absent a specific objection to the contrary at trial. *See Hawkins v. Hannigan*, 185 F.3d 1146, 1155 (10th Cir. 1999). *See also*

United States v. Plitman, 194 F.3d 59 (2d Cir. 1999); *United States v. Stephens*, 609 F.2d 230 (5th Cir. 1980). The appellant waived his right to confront his wife regarding her statements included in the stipulation of expected testimony to which he expressly agreed and for which there was no objection.

III. Corroboration of Confession

The appellant next claims that his written statement to law enforcement officers should have been excluded where it was insufficiently corroborated by other evidence. We disagree.

To be considered as evidence against the appellant, his confession must have been corroborated by independent evidence, either direct or circumstantial. Mil. R. Evid. 304(g). While the corroborating evidence must be reliable, it need only be slight and need only raise an inference of truth as to the essential facts admitted in the confession. *United States v. Cottrill*, 45 M.J. 485, 489 (1997). *See also United States v. Maio*, 34 M.J. 215 (C.M.A. 1992); *United States v. Rounds*, 30 M.J. 76 (C.M.A. 1990); *United States v. Melvin*, 26 M.J. 145 (C.M.A. 1988); *United States v. Yeoman*, 25 M.J. 1 (C.M.A. 1987). We have closely analyzed the evidence in this case and find that the appellant's confession was sufficiently corroborated. *See Cottrill*, 45 M.J. at 489. Even if we exclude from consideration the statements made by the appellant's spouse to law enforcement officers and Dr. Moriber, we still find sufficient corroboration in the testimony of the two neighbors.

IV. Lack of Instruction on Corroboration

The appellant's fourth issue is whether the military judge erred to the substantial prejudice of the appellant when she failed to instruct the members on the need for corroborating evidence to support the appellant's statement. This issue is without merit.

At trial, the appellant did not suggest such an instruction. Therefore, absent plain error, the appellant forfeits the issue. R.C.M. 920(f). *See United States v. Pagel*, 40 M.J. 771, 776 (A.F.C.M.R. 1994) (citing *United States v. Toro*, 37 M.J. 313, 316-17 (C.M.A. 1993); *United States v. Strachan*, 35 M.J. 362, 364 (C.M.A. 1992)) (distinguishing between 'waiver' and 'forfeiture'). The determination whether an admission or confession is adequately corroborated is made by the military judge. Mil. R. Evid. 304(g)(2). We find no error in not giving a specific instruction regarding corroboration.

V. Legal and Factual Sufficiency

In his final issue, the appellant claims the evidence was legally and factually insufficient to sustain convictions under Specification 1 and 2 of the Charge, which alleged batteries against the appellant's daughter and son, respectively. We disagree. We find the evidence to be legally sufficient. Further, after weighing the evidence in the record and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

We conclude the finding and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Senior Judge YOUNG and Judge ROBERTS concur.

Appendix C

1. The Sixth Amendment of the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him[.]

2. Article 39(a), U.C.M.J., [10 U.S.C. § 39(a)] provides in pertinent part:

At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may...call the court into session without the presence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter...which does not require the members of the court[.]